Supreme Court, U. S.
FILED
DEC 23 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-870

MINNESOTA PUBLIC INTEREST RESEARCH GROUP,

Petitioner,

vs.

SECRETARY OF AGRICULTURE; JOHN V. McGUIRE, individually, and as Chief, United States Forest Service; JAY CRAVENS, individually, and as Regional Forester; HAROLD ANDERSON, individually, and as Supervisor, Superior National Forest; CONSOLIDATED PAPERS, INC.; THE NORTHWEST PAPER COMPANY; NORTHERN FOREST PRODUCTS, LTD.; KAINZ LOGGING COMPANY; EMIL ABRAMSON; BOISE CASCADE CORPORATION; and SIERRA CLUB,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Elliot C. Rothenberg
Michael Milgrom
3036 University Avenue S.E.
Minneapolis, MN 55414
(612) 376-7554
Counsel for Petitioner

1976—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

TABLE OF CONTENTS

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutory provisions involved	3
Statement of the case	3
Reasons for granting the writ:	
I. The decision below misapplies and conflicts with prior decisions of the U.S. Supreme Court and other courts concerning the requisites of environmental impact statements under the National Environmental Policy Act	6
II. The decision below grants the Secretary of Agriculture unlimited discretion to manage wilderness areas for purposes inconsistent with the declared objective of the Wilderness Act	17
A. Congress enacted the Wilderness Act for the purpose of preserving wilderness areas from destruction by bureaucratic fiat. The Act has been held to impose a statutory limit on agency discretion in managing areas with wilderness characteristics	17
B. The Management Plan proposed by the Forest Service for the Boundary Waters Canoe Area is contrary to the mandates of the Wilderness Act	20
C. The differences between a natural and a man-made forest are significant. The BWCA contains a unique natural ecology which would be destroyed by the policy the Secretary proposes	24

D. The Wilderness Act requires that units of the National Wilderness Preservation System be managed so as to preserve their natural conditions 25

E. Under the ruling of the appeals court in this case, the Secretary can manage any wilderness area for purposes inconsistent with those of the Wilderness Act using the guise of administrative discretion 26

Conclusion 27

Appendix (Statutes, Regulations and Opinions below) .....Under Separate Cover

TABLE OF AUTHORITIES

Statutes:

Wilderness Act of 1964, 78 Stat. 890 .....3, 17
The National Environmental Policy Act, 83 Stat. 852 2

Cases:

Kleppe v. Sierra Club, — U.S. —, 49 L.Ed. 2d 576, 96 S.Ct. 2718 (1976) 2, 7, 9, 13, 14, 27
Natural Resources Defense Council v. Nuclear Regulatory Commission, — F.2d —, 9 ERC 1414 (CA2, September 8, 1976) 14
Parker v. United States, 448 F. 2d 793 (CA10 1971) 19

Administrative Regulations:

36 C.F.R. 293.16 .....4, 21

IN THE

Supreme Court of the United States

October Term, 1976

No.————

MINNESOTA PUBLIC INTEREST RESEARCH GROUP,

Petitioner,

vs.

SECRETARY OF AGRICULTURE; JOHN V. McGUIRE, individually, and as Chief, United States Forest Service; JAY CRAVENS, individually, and as Regional Forester; HAROLD ANDERSON, individually, and as Supervisor, Superior National Forest; CONSOLIDATED PAPERS, INC.; THE NORTHWEST PAPER COMPANY; NORTHERN FOREST PRODUCTS, LTD.; KAINZ LOGGING COMPANY; EMIL ABRAMSON; BOISE CASCADE CORPORATION; and SIERRA CLUB,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner Minnesota Public Interest Research Group respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 30, 1976.

REPORTS OF OPINIONS IN THIS CASE DELIVERED BY COURTS BELOW

1. 358 F. Supp. 504 (D. Minn. 1973), 5 ERC 1251.
2. 498 F. 2d 1314 (CA 8 1974), 6 ERC 1694.
3. 401 F. Supp. 1276 (D. Minn. 1975).
4. 541 F.2d 1292 (CA 8 1976), 9 ERC 1220.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Judgment of the United States Court of Appeals for the Eighth Circuit entered on August 30, 1976. Denial of petitioner's timely petition for rehearing dated September 28, 1976. Jurisdiction of this Court is conferred by 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Secretary of Agriculture can implement part of a proposed plan for the sale of timber in the last large virgin forest in the eastern United States, and allow commercial logging there, without disclosing the rest of the plan for logging the area and without filing the detailed statement required by the National Environmental Policy Act (NEPA) 83 Stat. 852, 42 U.S.C. §4321 et seq. The question is governed by the court's opinion in *Kleppe v. Sierra Club*, — U.S. —, 49 L.Ed. 2d 576, 96 S.Ct. 271 (1976).

2. Whether the Secretary of Agriculture has the discretion, under the provisions of the Wilderness Act, 78 Stat. 890, 16 U.S.C. §1131 et seq. to manage the forests of a designated wilderness for the purpose of changing it

to what he regards as a more desirable composition through the use of commercial logging.

STATUTORY PROVISIONS INVOLVED

Wilderness Act of 1964, 78 Stat. 890, 16 U.S.C. §1131 et seq.

National Environmental Policy Act, 83 Stat. 852, 42 U.S.C. §4321-§4332

Special Regulations for the Boundary Waters Canoe Area, 36 C.F.R. §293.16

STATEMENT OF THE CASE

On November 24, 1972, the Minnesota Public Interest Research Group brought this action to enjoin the United States Forest Service from engaging in further logging of virgin forest areas of the Boundary Waters Canoe Area (BWCA) in Minnesota. The BWCA is an area located within the Superior National Forest and designated as a unit of the National Wilderness Preservation System created by the Wilderness Act of 1964, 78 Stat. 890, 16 U.S.C. §1131 et seq. The BWCA covers some 1,030,000 acres of land, 540,000 of which are virgin forest, that is forest which has resulted entirely from natural factors rather than man-influenced factors such as logging, planting, and seeding. The BWCA contains the only substantial contiguous areas of virgin forest in the United States east of the Rockies and its virgin forest areas are larger than most Wilderness Areas west of the Rockies. The BWCA offers unique opportunities for wilderness recreation and research.

The Forest Service, which is charged with managing the entire Superior National Forest, has been engaged in

selling timber in the BWCA to commercial timber companies and does so pursuant to an arbitrary division of the BWCA into two zones by regulation (36 C.F.R. §293.16). The Forest Service permits logging in the Portal Zone which contains approximately 400,000 acres, 147,000 of which are virgin forest. All of the timber sales by the Forest Service are in virgin forest areas. No commercial logging is allowed in the Interior Zone which now contains approximately 600,000 acres.

The sales which are the subject of this action were made by the Forest Service to some of the private respondents during the period from 1959 to 1968. On all the sales the original term during which timber cutting was to have been completed had expired. The Forest Service granted unilateral extensions on the terms of these contracts in 1971 and 1972. The question raised at the first trial in this case was whether these extensions (and modifications of the contracts which occurred simultaneously) were subject to the requirements of the National Environmental Policy Act. Additionally, petitioners submitted that logging of virgin forest areas of the BWCA was prohibited by the Wilderness Act.

The District Court ruled that the extension and modifications were subject to NEPA and that the decision to extend or modify should have been preceded by an environmental impact statement (358 F. Supp. 584). Petitioner's Wilderness Act argument was held in abeyance pending determination by the Forest Service on whether it would continue to allow logging in the BWCA virgin forest. The Eighth Circuit affirmed the ruling that an EIS was required (498 F. 2d 1314).

In July of 1974 the Forest Service announced that its

new Management Plan and EIS for the BWCA were available (39 F. Reg. 25524, July 11, 1974). The Management Plan and EIS ostensibly were intended to cover all aspects of management of the BWCA but the treatment of timber management was incomplete, part of it being left for a timber management plan for the entire Superior National Forest, which has yet to be published.

Petitioner, joined by the Sierra Club, renewed this action on August 19, 1974, challenging the adequacy of the EIS and resubmitting its Wilderness Act argument. The District Court held (401 F. Supp. 1276) that the EIS was inadequate and that the Wilderness Act prohibited logging in the virgin forest of the BWCA.

On appeal to the Eighth Circuit, government respondents argued that the details on timber management missing from the Management Plan were forthcoming in a Timber Management Plan for the entire Superior National Forest. The private respondents argued that the legislative history of the Wilderness Act demonstrated that commercial logging was to be allowed in virgin areas. Petitioner argued that the purpose of the Wilderness Act and the plain meaning of the provisions of the Act governing the BWCA evinced a desire to preserve the virgin forest, and that the regulations promulgated by the Secretary of Agriculture and the present BWCA Management Plan had the objective of managing the forest for the purpose of changing its composition—an objective violative of the Wilderness Act. Petitioner also supported the District Court holding regarding violations of NEPA.

The Eighth Circuit ruled that logging was a legitimate management tool for the BWCA, that the Secretary of Agriculture had the discretion to allow logging in the

BWCA for whatever purposes he might choose, and that the EIS was adequate with respect to the six existing sales but not with respect to any future sales (541 F. 2d 1292, Appendix at A-224). On that basis, the court lifted the injunction with respect to the existing sales of timber but continued it for any future sales pending preparation of the Superior National Forest Timber Management Plan and its accompanying EIS.

A petition for rehearing dated September 11, 1976 was denied on September 28, 1976. Application for stay of mandate pending disposition of application for writ of certiorari was denied by the Eighth Circuit on October 19, 1976. Application for Recall of Mandate was filed with this Court on October 25, 1976 and denied on November 8, 1976.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

THE DECISION BELOW MISAPPLIES AND CONFLICTS WITH PRIOR DECISIONS OF THE U.S. SUPREME COURT AND OTHER COURTS CONCERNING THE REQUISITES OF ENVIRONMENTAL IMPACT STATEMENTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT.

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4321 et seq., requires, in §4332 (Appendix at A-8):

> The Congress authorizes and directs that, to the fullest extent possible . . . all agencies of the Federal Government shall—
>
> . . .

> (c) include in every recommendation or report on proposals for legislation and other major Federal actions affecting the quality of the human environment a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

As the Court of Appeals' opinion (at A-251) pointed out, the recent decision in *Kleppe v. Sierra Club*, — U.S. —, 49 L.Ed. 2d 576, 44 USLW 5104 (June 28, 1976) held that a comprehensive environmental impact statement (EIS) would be required where proposed federal actions will have a "cumulative or synergistic" impact upon the area. All such actions must be considered together in the comprehensive EIS.

> Thus, when several proposals for coal related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action. 49 L.Ed. 2d at 590, 44 USLW at 5109-10.

In the particular circumstances of the *Kleppe* case the Supreme Court reversed an injunction against proceeding

with leasing certain parcels of land for coal development, with each lease covered by a separate EIS, until the agency had completed a regional environmental impact statement for the development of a four-state region. In so doing, the Supreme Court stressed that the agency concerned had denied the existence of an overall plan for regional development of coal and that the evidence on this point was not sufficient to contradict the agency's denial.

In the current litigation, by contrast, the Court of Appeals found that there is an overall plan for logging in the Boundary Waters Canoe Area (BWCA) and that the EIS submitted to the District Court is inadequate as to any logging except the existing sales, or contracts to cut timber.

> Although the EIS and Management Plan adequately describe the environmental impacts and alternatives with respect to the existing sales, the overall plan for logging in the future is incomplete. The Plan and EIS are designed to serve as the Forest Service's major decision-making tools for ten years. Yet neither contain any criterion, beyond that relating to the existing sales, for determining what sites are to be logged, when the logging will take place, at what rate the logging will take place or what species will be logged. (p. A-251).

Astonishingly, in spite of this failure to disclose even the most elementary information necessary to assess the impact of planned future logging in virgin timber areas of the BWCA, the Court below lifted the injunction against logging under the current sales which it had affirmed in its earlier decision in this litigation, 498 F. 2d 1314 (1974). Nevertheless, logging in the BWCA under

the Forest Service's ten year plan will have cumulative effects upon the BWCA. The effects of current and future sales are sufficiently interrelated to mandate consideration by a comprehensive EIS before the injunction against logging on current sales should be lifted. The decision of the Court of Appeals to permit logging before submission of the comprehensive EIS it held to be required conflicts squarely with *Kleppe v. Sierra Club*.

For purposes of NEPA and the preparation of environmental impact statements, there is no logical or empirical reason for segregating present logging from future logging. The Management Plan and EIS submitted by the Forest Service to the District Court contained no separate management directions for present as distinct from future sales nor any indication whatsoever that present logging was anything but an integral part of the overall timber harvesting policy. Quite to the contrary, the evidence demonstrated that the present logging will have a cumulative and synergistic impact upon the BWCA. This is true despite the fact that the current sales may involve only 5000 acres of uncut timber, according to a footnote (p. A-251) in the decision under review. As the District Court found in its first decision, the actual number of acres affected by logging could be considerably greater than the acres which actually will be cut (p. A-91) Moreover, the ostensibly small acreage notwithstanding, what is of critcial importance is not merely the number of acres which are to be logged but the location of logging operations and particularly the cumulative impact of present and future logging upon the remaining large contiguous blocks of virgin forest.

The District Court in its first decision recognized that permitting even a minimal degree of logging in one area

could inevitably serve as a foot in the door leading to ever greater incursions into the given area of virgin forest.

> The Court is concerned about what has been called the "nibble effect." The "nibble effect" refers to the process whereby the Forest Service makes a timber sale that carves out an incursion into a virgin forest area and then uses that incursion to justify further timber sales in that area. The Court feels that some of the areas to be cut this winter may be used to justify additional timber sales in the future, and thus may well have an effect on an area far larger than the area physically affected by the logging planned for this winter. (p. A-92).
>
> Whereas many of the active timber sales in the BWCA are small sections of areas which already have been logged or are cut off from the main virgin forest areas of the BWCA by large areas which have been logged, many involve areas of virgin forest that are contiguous with the main virgin forest areas of the BWCA. While the logging planned for this winter represents relatively small intrusions into such areas, it is nonetheless true that they would be significant intrusions. (p. A-93).

This decision was affirmed by the Eighth Circuit Court of Appeals in 498 F. 2d 1314 (1974).

In the decision under review, the Court of Appeals reemphasized the danger of fragmenting the remaining large blocks of virgin forest in the BWCA and explained that a comprehensive EIS, which the Forest Service has yet to provide, was consequently required.

> We adhere to the view implicit in our prior opinion that a comprehensive EIS is required in this case. The EIS before us is adequate in most respects. However, more specific information is needed to apprise the decision makers as to where, when, what species of trees, and at what rate logging will occur in the Portal Zone throughout the life of the Plan. This information is needed to determine not only how many areas will be logged, but which areas will be affected so that fragmentation of the remaining large blocks of virgin forest can be avoided. Furthermore, as scientific, educational and recreational demands increase in the area, this information is necessary to keep the decision makers informed as to the best available multiple use policy for the area.
>
> . . .
>
> Under these circumstances, we think it appropriate to disolve the permanent injunction only with respect to the existing timber sales. The Forest Service concedes that the BWCA EIS and Management Plan were not intended to comprehensively analyze the environmental effects of timber management in the BWCA. Nonetheless such analysis is necessary. (p. A.-251—A-252).

The Forest Service itself acknowledged that fragmentation of large contiguous blocks of virgin forest is the crux of the problem posed by logging in the BWCA. For example, the Environmental Analysis Report for the West Tofte Sale stated:

> The major irreversible situation is the encroachment on the contiguous virgin area of the BWCA. . . . The encroachment on this virgin area will result in a reduction of the area in the BWCA suitable for wilderness research of virgin stands. In evaluating this situation, we must consider what this loss means in terms of other areas still available for wilderness research. There are still large areas in the interior zone available and also many stands in the portal zone

> will not be cut. However, we will lose a large contiguous area to research and when compared to the entire land base in the United States that fits these criteria, then the loss takes on greater importance. This loss is unavoidable under the proposed action. Government Exhibit 46, p. 23-24.

There was considerable additional evidence that cutting under the present sales cannot fairly be dismissed as being only a "negligible incursion" (p. A-251) into the virgin forests of the BWCA but rather that the present virgin forest blocks already are of minimal size for important scientific research.

> Even the largest virgin blocks, including the threatened sales and Portal Zone virgin areas, are already of minimal size for studies of large-scale ecosystem questions such a prey-predator relationships in a natural ecosystem, studies of the natural role of insects, plant disease, or windstorms in a forest system, or studies of the natural role of fire. These virgin areas could also provide sites for the education of the general public in understanding complex ecosystems and the ecological problems facing mankind. Affidavit of petitioner's witness M. Heinselman at 10.

In its first decision in this case, the Court of Appeals affirmed an injunction against commercial logging in the Portal Zone of the BWCA pending completion by the Forest Service of its BWCA Management Plan and accompanying EIS, 498 F. 2d 1314 (8th Cir. 1974). It observed then that "The Forest Service contemplates that the impact statement to be filed will cover all facets of their new BWCA Management Plan, including the Forest Service policy on timber cutting" (p. A-114). However in its brief

submitted to the Court of Appeals in the second appeal, the Forest Service conceded that its Management Plan and EIS did not adequately analyze the environmental effects of logging in the BWCA.

> There was never a suggestion made that this Plan purported to be the ultimate analysis of the environmental effects of timber management in the BWCA. In fact, the Forest Service is currently preparing the Timber Management Plan for the Superior National Forest, of which the BWCA is a part. This Timber Management Plan, on which an EIS will also be filed, will provide more detailed consideration on such subjects as sale site selection, harvest rates and mitigation measures. (Brief of Government Appellants, p. 35)

The Forest Service provided no reason whatever for differentiating present from future sales for purposes of environmental analysis, for bifurcating consideration of the effects of logging in the BWCA between present and future sales, or for failing to provide a comprehensive environmental impact statement when the District Court and Court of Appeals had ordered the preparation of such a document previously.

In an abdication of judicial responsibility under the National Environmental Policy Act, the Court below permitted logging to resume on bare assurances by the Forest Service that a more detailed management plan and accompanying EIS are forthcoming and will be legally adequate (p. A-252). This decision would allow—even encourage—agencies so disposed to circumvent the *Kleppe* requirement of a comprehensive EIS. By the subterfuge of supplying no more than pro forma plans and impact statements covering only current activities together with prom-

ises of more detailed and more comprehensive management plans and environmental impact statements in the future, these agencies could continue present activities undisturbed by injunctions. Such evasion of NEPA could not have been the intention of *Kleppe v. Sierra Club*.

The error in the Eighth Circuit Court's interpretation of *Kleppe v. Sierra Club* is made more manifest by a recent decision of the Second Circuit Court of Appeals in *National Resources Defense Council v. Nuclear Regulatory Commission*, — F. 2d —, 9 ERC 1414 (2d Cir., Sept. 8, 1976). Basing its decision entirely on *Kleppe*, the second Circuit held that until an adequate comprehensive EIS was prepared with respect to the Commission's decision to proceed to general commercial licensing of a new nuclear technology, the Commission would be enjoined from proceeding with interim licensing even though an EIS was submitted to the Court which purportedly covered the environmental impact of that interim licensing. The decision emphasized that

> interim impact statements drafted in accordance with presently existing Commission rules and precedents would necessarily result in impact analyses inadequate under NEPA. 9 ERC at 1415.

Following *Kleppe*, the Court held that all licensing, even that denominated "interim," would be enjoined pending completion of a comprehensive EIS.

Far from counterbalancing the considerations presented above, the Court below did not explain any necessity for permitting logging now on existing sales before the preparation of the comprehensive EIS it held to be required. In its first decision in this litigation, 358 F. Supp. 584

(1973), the District Court found that there would be no deleterious economic effects from enjoining logging on current sales pending submission of an adequate EIS.

> The private defendants . . . would not be greatly injured by an injunction proscribing all logging in the BWCA pending the Forest Service's impact statement because they all have enormous reserves of timber of the same type that they planned to have cut in the BWCA this winter. Thus, the only injury to the private defendants . . . will be the increased costs, if any, of having more timber cut on their own land or on their other timber sales. (p. A-88-A-89). Also see p. A-32-A-40 for more detailed discussion).

The Court of Appeals affirmed in 498 F. 2d 1314 (1974). In its second decision, 401 F. Supp. 1276 (1975), the District Court made similar findings.

> While it appears that there would be some harm to the private defendants from the loss of virgin forest as a source of forest products pending the completion and filing of an adequate EIS, no urgent need for production has been shown. These defendants can satisfy most of their needs from alternative sources of supply. In fact, the evidence showed that the defendants can obtain adequate sources of timber even if the BWCA were to be permanently closed to all logging operations. (p. A-222)

Although the decision under review lifted the injunction, it made no finding of error regarding the above-quoted paragraph. Thus, neither the District Court nor the Eighth Circuit Court of Appeals has found in any of the four decisions in this case that there is an economic necessity to log virgin timber on the current sales before an adequate

comprehensive environmental impact statement has been prepared.

The District Court's first decision spoke of the irreplaceable and priceless quality of the BWCA.

> In conclusion, the Court notes that witness after witness spoke in almost reverent tones of the rare beauty, the scenery, the solitude and the "oneness with nature" that they found while in the BWCA. It was termed a gem, a jewel, and likened to a rare antique of ancient vintage. The evidence clearly showed that there is no area like it nor can there be another of its kind. (p. A-29).

In the decision under review, the Court of Appeals quoted with approval the statement in the Draft Management Plan of the Forest Service which referred to the BWCA as "unique, pristine, endangered, rugged, primitive, beautiful and fragile" (p. A-226)

With the prospect of irreparable damage to such a unique and irreplaceable resource so great, and with the potential economic gains so small, petitioner respectfully submits that prudence would dictate a review of the Eighth Circuit Court of Appeals' reversal of the Minnesota District Court's decision to enjoin any logging until the Forest Service has prepared a comprehensive environmental impact statement which would fully disclose the effects of present and future logging in the BWCA.

II.

THE DECISION BELOW GRANTS THE SECRETARY OF AGRICULTURE UNLIMITED DISCRETION TO MANAGE WILDERNESS AREAS FOR PURPOSES INCONSISTENT WITH THE DECLARED OBJECTIVE OF THE WILDERNESS ACT.

A. Congress enacted the Wilderness Act for the purpose of preserving wilderness areas from destruction by bureaucratic fiat. The act has been held to impose a statutory limit on agency discretion in managing areas with wilderness characteristics.

The Wilderness Act, 78 Stat. 890, 16 U.S.C. §1131 et seq.[1] contains an extensive, yet specific, section on the purpose for its enactment.

> In order to assure that an increasing population accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness areas," and *these shall be administered* for the use and enjoyment of the American people *in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness;* and

[1]Appendix at A-1 - A-6.

> no Federal lands shall be designated as "wilderness areas" except as provided for in this Act or by a subsequent Act. 16 U.S.C. §1131(a). (Emphasis supplied).

The Act designated those areas classified by the Secretary of Agriculture and the Chief of the Forest Service as "wilderness," "wild," or "canoe" as areas to be included in the National Wilderness Preservation System.[2]

Other areas were to be included after further study. The reason for including these areas in the system, although they were already being managed to preserve their character, was to prevent any changes in their status from occurring without an act of Congress. Thus, the House Report on the Wilderness Act legislation states that:

> Except for the Boundary Water Canoe Area, none of the areas has been granted statutory recognition.[3] Having been established by administrative action of the executive branch, any of the wilderness, wild and primitive areas could be similarly de-classified and abolished by administrative action. In the alternative the administrators could, if they so desired, change the rules governing the uses allowed or prohibited within such areas. *House Report No. 1538, Interior and Insular Affairs Committee,* 88th Cong. 2nd Sess., (July 2, 1964), 1964 USCCAN at 3616.

[2]16 U.S.C. §1132(a). The BWCA was, and is, the only designated "canoe" area.

[3]Statutory recognition of the BWCA was given by the legislation referred to at 16 U.S.C. §1133(a) (2) (Appendix at A-4). These laws prohibited most logging within 400 feet of lakes, streams, and portages and authorized the Secretary of Agriculture to purchase land within those areas. These statutes did not give protection to the rest of the land area of the BWCA. The actual boundaries of the BWCA were set entirely by administrative regulation until passage of the Wilderness Act.

The same intent, to prevent changes in the use of Wilderness Areas, except by Act of Congress, was evidenced in the Senate report on S. 4, a bill identical to that which was enacted.

> As part of the wilderness preservation system, they would be preserved in their primitive condition, as nearly as possible devoid of the works of man, unless Congress or the President of the United States determine that other use of some portion is in the greater public interest. *Senate Report No. 109, Committee on Interior and Insular Affairs,* 88th Cong., 1st Sess., (April 3, 1963) at 1. (Emphasis supplied.)

The Act has been interpreted by the courts in light of this statutory purpose. In the case of *Parker v. United States,* 448 F.2d 793 (CA10 1971) cert. denied 405 U.S. 989 (1972), the Tenth Circuit held that the Wilderness Act imposed a statutory limit on agency discretion and that the limitation was contained in the definition of wilderness as well as the particular section applicable to that case.[4] The case concerned a Forest Service sale of timber in an area contiguous to a designated "primitive" area. 16 U.S.C. §1132(b) required the Secretary of Agriculture to study all the areas which he had classified as "primitive" and recommended to the President which areas should be included in the Wilderness Preservation System. It gave the President discretion to designate additional areas contiguous to the primitive areas for inclusion. The *Parker* court held that the Secretary could not destroy the wilderness character of this area by logging because this would infringe on the power of the President to designate it a wilderness. This was done despite the fact that

[4]448 F.2d at 797.

the Secretary had studied the area and determined that it did not have wilderness characteristics. The Secretary's findings were overruled by the District Court and the Tenth Circuit. Moreover, the court refused to allow a circumvention of its holding by a sale of timber that would have logged the area in question except for a buffer strip along the boundary of the contiguous primitive area. Thus, the court affirmed the mandate of the Act that the decision of whether or not an area is to remain a wilderness is not for the Secretary of Agriculture (as it had been prior to the Act) but for the President and Congress.

B. The management plan proposed by the Forest Service for the Boundary Waters Canoe Area is contrary to the mandates of the Wilderness Act.

The Wilderness Act prohibits commercial enterprise, including logging, within designated wilderness areas.[5] It also prohibits permanent roads[6] and requires that wilderness areas be managed as to preserve their wilderness characteristics:

> Except as otherwise provided in this Act, each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character. Except as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use. 16 U.S.C. §1133(b).

[5]16 U.S.C. §1133(c).
[6]*Ibid.*

The Act contains two special provisions relating to the BWCA. One section reaffirms prior statutory protection of the BWCA.[7] The Act provides further that:

> Other provisions of this Act to the contrary notwithstanding, the management of the Boundary Waters Canoe Area, formerly designated as the Superior, Little Indian Sioux, and Caribou Roadless Areas, in the Superior National Forest, Minnesota, shall be in accordance with regulations established by the Secretary of Agriculture in accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, including that of timber, the primitive character of the area, particularly in the vicinity of lakes, streams, and portages: Provided, That nothing in this Act shall preclude the continuance within the area of any already established use of motorboats. 16 U.S.C. §1133(d) (5).

The administrative history of the BWCA indicates that logging was allowed in the Portal Zone of the BWCA[8] only for the limited purpose of sustaining that portion of the local economy dependent upon logging.[9] However, the 1974 Management Plan proposed for the BWCA declared a different objective for management of the BWCA:

[7]16 U.S.C. §1133(a) (2). The objectives of these statutes are summarized at f. 3 *supra*.
[8]A 1941 regulation, now codified as 36 C.F.R. 293.16, and contained in the Appendix, divided the BWCA into two zones—Portal and Interior. Commercial logging is permitted in the Portal Zone only. The zones serve no other purpose save to define the area in which logging is permitted. The Interior Zone has been enlarged twice since 1941 by the addition of areas recently logged. There is no biological difference between the forests of the Interior Zone and those of the Portal Zone. Both zones contain some areas which have been logged and some which are virgin.
[9]See 1937 Management Plan for the BWCA at p. 1. 1948 Management Plan at p. 10.

> In short, the policies are aimed at perpetuating a variety of successional stages, and the diversity of vegetation communities and hence will produce long-term favorable effects.[10]

The Management Plan then sets out policies for management of the BWCA forests consistent with these objectives including in the Portal Zone commercial logging, non-commercial logging[11] and use of herbicides and insecticides.

This reversal in policy—from one aimed at preserving primitive character with minimum impact on the economy to one of management for other purposes—was the culmination of a process which began in 1964 with the appointment of a Boundary Waters Canoe Area Review Committee (the Selke Committee) by the Secretary of Agriculture. In formulating a management policy for the BWCA forests the committee relied upon concepts of forest management geared to national parks and recreation areas, not on wilderness management concepts. The committee decided that the forests of the BWCA should be managed to produce a forest of long-lived species, red and white pine, which its forestry experts considered to be aesthetically superior.

The 1974 BWCA Management Plan itself acknowledges that the significance of the BWCA as a timber resource is highly debatable.[12] More important, it explicitly denies any economic motive for allowing commercial logging to continue and insists that commercial logging is utilized merely as a management tool to promote the aesthetic and

[10]1974 Management Plan and EIS at p. 5.
[11]Referred to as "administrative cutting."
[12]BWCA Management Plan and EIS at 28.

recreational qualities of the area.[13] At trial it was brought out that this objective has nothing whatever to do with either the Wilderness Act objectives of preservation of natural conditions or the objective declared by 16 U.S.C. §1133(d) (5) for the BWCA: preserving the primitive character of the area.[14]

The Appeals Court noted petitioner's argument as set forth above but said that it would not interfere with the management function of the Secretary of Agriculture and that he had the discretion to use logging for any purpose.[15] However, later in its opinion[16] the Court affirmed the management policy of the Forest Service, claiming that all parties agreed that the forests must be managed and holding specifically that timber harvesting is a controllable management tool.[17]

Thus, the consequence of the Appeals Court holding is that the Forest Service would be allowed to use a narrow exception to the ban on commercial logging in Wilderness Areas as a door through which to pull the concept of management of Wilderness Areas for varied purposes.

[13]*Ibid.* at p. 15-16.
[14]Petitioner has contended throughout that "primitive character" as used in 16 U.S.C. §1133(d) (5) means essentially the same thing as "wilderness" defined in 16 U.S.C. §1131(a). Examination of Forest Service officials showed that they have no definition whatever of "primitive character." The Appeals Court also declined to define the term.
[15]At A-234.
[16]At A-254.
[17]This is a misstatement of petitioner's position. All parties agree that wildfire was the natural agent which brought about the continued regeneration of the forests before the coming of man. They also agree that continued supression of wildfire by the Forest Service will alter the natural process. Petitioners contend, however, that if the Forest Service feels it must continue to suppress wildfire but wants to continue the natural regeneration process it should use controlled fire, a process which has been used in western Wilderness Areas but is still experimental in the BWCA. Government experts agreed that use of controlled fire would be possible in five to ten years and that it was not necessary to log areas pending development of controlled fires in order to continue the regeneration process.

C. The differences between a natural and man-made forest are significant. The BWCA contains a unique natural ecology which would be destroyed by the policy the Secretary proposes.

The District Court made extensive findings on the effects of logging on the natural forests of the BWCA concluding that the differences between a man-made forest and the primitive forest are significant and that logging destroys the primitive character of the areas affected. These effects are detailed at 358 F.Supp. 609-617, A-57-A-73. The Appeals Court affirmed that the effects of logging on virgin forests were sufficient to require an environmental impact statement.[18] The District Court reaffirmed its earlier findings in its second opinion[19] and these findings were undisturbed on appeal.

The BWCA contains the last significant remnants of the eastern conifer forest, a forest that once stretched across the east from Minnesota all the way to Maine. The natural food chains and ecology are unusually complete. It is the last area in the lower 48 states where the eastern timber wolf can still be found in its natural habitat and is the home of many other rare and endangered plants and animals. It is the only place in the continental U.S. where some of these plants and animals can be seen and studied in their natural setting. This fragile natural environment will be altered under the management goals and objectives adopted by the Forest Service.

---

[18]See opinion at A-110 - A-112. Moreover, the Appeals Court held that the significance of the effects was an indicator that the action was "major" within the meaning of NEPA.

[19]Appendix at A-131.

D. The Wilderness Act requires that units of the National Wilderness Preservation System be managed so as to preserve their natural conditions.

The Wilderness Act specifically directs the agencies which manage the Wilderness Areas to manage them so as to preserve their wilderness character.[20] The Act defines "wilderness" to mean "an area which is protected and managed so as to preserve its natural condition . . ."[20a] The opening section of the Wilderness Act listed three ways in which management of wilderness areas was to be directed.

1. leave areas unimpaired for future use and enjoyment as wilderness.

2. protect and preserve wilderness character,

3. gather and disseminate information regarding their use and enjoyment as wilderness.[20b]

The last mentioned is of particular note. The virgin forests of the BWCA are already of minimal size for the purposes of certain types of scientific study. They represent the last area available for large scale study of the natural ecosystem of the forests which once stretched half-way across the country. The fact that the existing commercial sales involve only a few thousand acres is irrelevant in this regard since the Appeals Court opinion grants discretion to the Secretary of Agriculture to log as much of the BWCA as he desires.

---

[20]16 U.S.C. §1132(b), 16 U.S.C. §1131(a).

[20a]16 U.S.C. §1131(c).

[20b]16 U.S.C. §1131(a).

E. Under the ruling of the Appeals Court in this case, the Secretary can manage any wilderness area for purposes inconsistent with those of the Wilderness Act using the guise of administrative discretion.

The Appeals Court has allowed the Secretary to use commercial logging as a management tool in the BWCA ostensibly because it is a legitimate management tool. Insofar as the court held that commercial logging is a legitimate management tool for maintaining the wilderness character of the BWCA[21] this holding flies in the face of all the evidence. Insofar as it decrees that "maintaining diversity, and a variety of successional stages" is a legitimate objective of wilderness management it goes against the plain meaning of the Wilderness Act. Although management of the BWCA is governed partially by a special provision of the Wilderness Act, other provisions of the Act provide ample room for the introduction of logging in other areas if the scope of the Secretary's discretion is as large as the Appeals Court has held. For example, the Act provides that ". . . such measures may be taken as may be necessary in the control of fire, insects, and disease, subject to such conditions as the Secretary deems desirable."[22] This provision was not used as a justification for commercial logging in this case but if the Secretary's discretion is so broad, there is no reason why he could not use commercial logging to control fire, insects, and disease even though other methods might accomplish the same result consistent with preservation of wilderness character as mandated by the Act.

[21]Or the primitive character, to use the language of 16 U.S.C. §1133(d) (5).
[22]16 U.S.C. §1133(d) (1).

Similarly, the Act grants special privileges to prospectors[23] and for use of water resources[24] and allows commercial services in a wilderness area to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the area."[25] If such exceptions allow the Secretary to redefine the management objectives of the Wilderness Act—as the Court of Appeals indicates they do—they will swallow up the rule of preservation. It must be recognized that exceptions are subject to the overall requirement to preserve wilderness character. Where an agency adopts a non-wilderness management policy to manage a wilderness area, the courts must enforce obeisance to the language and purpose of the Act.

CONCLUSION

If the decision of the Eighth Circuit Court of Appeals lifting the injunction against logging in the Boundary Waters Canoe Area is not reviewed, irreparable damage could be inflicted upon a unique and irreplaceable natural resource. At the very lease, commercial logging should await the comprehensive study of environmental effects mandated by the National Environmental Policy Act and the Supreme Court in *Kleppe v. Sierra Club*. The irrevocability of the effects of logging upon the virgin forests of the BWCA and the impossibility of ever returning these areas to their virgin state necessitate that such commercial logging be subject to the maximum scrutiny. Furthermore, the court's interpretation of the Wilderness Act grants enor-

[23]16 U.S.C. §1133(d) (2).
[24]16 U.S.C. §1133(d) (4).
[25]16 U.S.C. §1133(d) (6).

mous discretion to manage wilderness areas in ways inconsistent with the Act.

For the reasons stated in this petition, the Minnesota Public Interest Research Group respectfully urges that this Court grant the requested writ of certiorari.

Respectfully submitted,

ELLIOT C. ROTHENBERG
MICHAEL MILGROM
Attorneys for Petitioner
3036 University Avenue S.E.
Minneapolis, MN. 55414
(612) 376-7554

Supreme Court, U.S.
FILED
FEB 24 1977
MICHAEL RODAK, JR., CLERK

No. 76-870

In the Supreme Court of the United States

OCTOBER TERM, 1976

MINNESOTA PUBLIC INTEREST RESEARCH GROUP, PETITIONER

v.

SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

PETER R. TAFT,
Assistant Attorney General,

EDMUND B. CLARK,
GEORGE R. HYDE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-870

MINNESOTA PUBLIC INTEREST RESEARCH GROUP, PETITIONER

v.

SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The final opinion of the court of appeals *en banc* (Pet. App. A-224 to A-264) is reported at 541 F. 2d 1292. The opinion of the district court (Pet. App. A-123 to A-223) is reported at 401 F. Supp. 1276. An earlier opinion of the court of appeals *en banc* (Pet. App. A-97 to A-122) is reported at 498 F. 2d 1314 and the district court's opinion (Pet. App. A-14 to A-96) is reported at 358 F. Supp. 584.

JURISDICTION

The judgment of the court of appeals *en banc* was entered on August 30, 1976. A timely petition for rehearing was denied on September 28, 1976. The petition for a writ of certiorari was filed on December 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Wilderness Act prohibits commercial logging in virgin timber areas within the Boundary Waters Canoe Area of the Superior National Forest.

2. Whether an environmental impact statement prepared by the Forest Service to accompany its ten-year management plan for the Boundary Waters Canoe Area satisfied the requirements of the National Environmental Policy Act with respect to the completion of existing timber sales.

STATEMENT

1. In November, 1972, petitioner instituted this action in the United States District Court for the District of Minnesota seeking to halt the cutting of timber in the Boundary Waters Canoe Area (BWCA) of the Superior National Forest in the State of Minnesota.[1] After a hearing, the district court enjoined further cutting pending the completion of an environmental impact statement that the Forest Service was then in the process of preparing (Pet.

[1]The BWCA, containing 1,030,000 acres located in the Superior National Forest, was designated by the Forest Service as a canoe area. Subsequently, Congress included the BWCA as part of the Natural Wilderness Preservation System. Wilderness Act, 78 Stat. 890, 16 U.S.C. 1131 *et seq.* Heavy recreational use is made of its developed system of lakes and portages. The area has been divided into an Interior (or no cut) Zone and a Portal Zone where timber cutting has been permitted for many years. Recreation has historically been confined to the lakes and portages and developed road systems. Entry into the area of high recreational use is through the Portal Zone to the Interior Zone where 90 percent of the visitors to the BWCA come for the purposes of water recreation. The Shipstead-Nolan Act of 1930, 46 Stat. 1020, 16 U.S.C. 577 *et seq.*, provided that timber harvest shall not generally occur within 400 feet of the natural shorelines. In addition, the Forest Service has forbidden logging that is visible from any lake, stream or portage or within 400 feet of trails. To preserve the quality of the recreational experience, most logging occurs during the winter months, when recreational use is at its lowest.

App. A-14 to A-96). The court of appeals sitting *en banc* affirmed (Pet. App. A-97 to A-122).

2. Litigation was renewed after the Forest Service completed the impact statement on the ten-year management plan for the BWCA. After trial, the district court permanently enjoined timber harvesting, holding that the Wilderness Act prohibited all timber cutting in the virgin areas of the BWCA; that the impact statement was inadequate; and that the decision to allow timber cutting was arbitrary and capricious (Pet. App. A-123 to A-223).

3. By unanimous decision, the court of appeals sitting *en banc* reversed (Pet. App. A-224 to A-264). The court of appeals held that the Wilderness Act did not prohibit commercial logging in the virgin areas of the BWCA Portal Zone, and that "the [environmental impact statement] and Management Plan adequately describe the environmental impacts and alternatives with respect to the existing sales * * *" (Pet. App. A-251). Although dissolving the injunction with respect to existing timber sales, the court sustained the injunction with respect to future sales, pending completion by the Forest Service of its timber management plan for the Superior National Forest and accompanying impact statement (*id.* at A-252). The court denied a timely petition for rehearing.

ARGUMENT

1. Petitioner challenges (Pet. 17-27) the unanimous holding of the court of appeals *en banc* that Section 4(d)(5) of the Wilderness Act, 78 Stat. 895, 16 U.S.C. 1133 (d)(5), permits commercial logging within the Portal Zone of the Boundary Waters Canoe Area. Petitioners rely upon the general provisions of the Wilderness Act; however, the explicit statutory language of the provision that applies to the BWCA alone contemplates the continuation of timber cutting. Section 1133(d)(5) states: "Other provisions of this Act to the contrary notwithstanding, the management of the

Boundary Waters Canoe Area * * * shall be in accordance with regulations established by the Secretary of Agriculture in accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, including that of timber, the primitive character of the area * * *." Moreover, as the court of appeals held, both the "administrative history of the BWCA and the legislative history of the Wilderness Act conclusively show that logging was to continue as a permissible use within the BWCA's Portal Zone under the Act" (Pet. App. A-231, A-256 to A-264).

Petitioner argues that this timber use is inconsistent with the general purposes of the Act and unwise as a management tool (Pet. 26-27). But Congress made its choice by enacting Section 1133(d)(5); a decision on any substantive policy change "must come from Congress or the responsible executive agency, not from the courts" (Pet. App. A-233). Cf. *Crooks* v. *Harrelson*, 282 U.S. 55, 60.[2] The decision of the court of appeals is correct, and there is no occasion for this Court to review the meaning of a unique statutory provision that applies to the BWCA alone.

2. Petitioner claims (Pet. 6-16) that the court of appeals incorrectly permitted logging on existing sales in the absence of an impact statement fully describing the environmental impact of any future sales. The existing sales were made during the period 1959-1969 (Pet. App. A-101 to A-102, n. 8), logging roads for those sales have been constructed, and logging has been partially completed (Pet. App. A-47 to A-57). The remaining timber to be logged constitutes approximately 5,500 acres or less than one percent of the BWCA virgin forest (Pet. App. A-227). The court of appeals held that the environmental impact

[2]A bill was recently introduced in Congress to withdraw the authority for timber harvesting in the Boundary Waters Canoe Area. 123 Cong. Rec. H624 (daily ed., January 31, 1977).

statement accompanying the BWCA ten-year management plan, together with the individual environmental analysis reports (EARs) on the individual sales, fully analyzed the environmental impact of completion of these existing sales. The court concluded (Pet. App. A-250 to A-251):

> We are convinced that the EIS and EARs were prepared by the Forest Service with good faith objectivity. They provide enough specific information to permit a reasoned choice of alternatives. They are, therefore, in compliance with the "detailed statement" requirement of NEPA.

The impact of future sales will, as the court of appeals stated, be detailed in the Timber Management Plan for the Superior National Forest and the accompanying environmental impact statement (Pet. App. A-252). The court continued the permanent injunction against future sales pending completion of those documents and appropriate review, but dissolved the injunction with respect to existing timber sales (Pet. App. A-254). Since logging under the existing sales in no way commits the Forest Service to the approval of future sales, the court of appeals' decision to permit continued logging on existing sales is fully consistent with this Court's statement in *Kleppe* v. *Sierra Club*, No. 75-552, decided June 28, 1976, slip op. 22, n. 26:

> Nor is it necessary that petitioners always complete a comprehensive impact statement on all proposed actions in an appropriate region before approving any of the projects. As petitioners have emphasized, and respondents have not disputed, approval of one lease or mining plan does not commit the Secretary to approval of any others * * *. Thus, an agency could approve one pending project that is fully covered by an impact statement, then take into consideration the environmental effects of that existing project

when preparing the comprehensive statement on the cumulative impact of remaining proposals.[3]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

PETER R. TAFT,
Assistant Attorney General.

EDMUND B. CLARK,
GEORGE R. HYDE,
Attorneys.

FEBRUARY 1977.

---

[3]Petitioner cites (Pet. 14) the *per curiam* opinion on rehearing in *Natural Resources Defense Council, Inc.* v. *United States Nuclear Regulatory Commission*, Nos. 75-4276, 75-4278, September 8, 1976 (C.A. 2), petitions for certiorari pending, Nos. 76-653, 76-762, 76-769 and 76-774. As the United States and the Nuclear Regulatory Commission stated in their memorandum in response to those petitions, the *per curiam* opinion of the court of appeals in that case cannot be reconciled with *Kleppe* v. *Sierra Club, supra.* (We are furnishing counsel for petitioners here with a copy of that memorandum.) In any event, *Natural Resources Defense Council, Inc., supra,* is distinguishable because, unlike the instant case, there the court of appeals stated (incorrectly, we believe) that current activity would commit resources in such a way as to preordain choices regarding future actions (slip op. 5485).

Supreme Court, U. S.
FILED
JAN 21 1977
MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
October Term, 1976

No. 76-870

MINNESOTA PUBLIC INTEREST RESEARCH GROUP,

Petitioner,

vs.

SECRETARY OF AGRICULTURE; JOHN V. McGUIRE, individually, and as Chief, United States Forest Service; JAY CRAVENS, individually, and as Regional Forester; HAROLD ANDERSON, individually, and as Supervisor, Superior National Forest; CONSOLIDATED PAPERS, INC.; THE NORTHWEST PAPER COMPANY; NORTHERN FOREST PRODUCTS, LTD.; KAINZ LOGGING COMPANY; EMIL ABRAMSON; BOISE CASCADE CORPORATION; and SIERRA CLUB,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

BRIEF FOR RESPONDENTS POTLATCH CORPORATION, NORTHERN WOOD PRESERVERS, LTD., AND BOISE CASCADE CORPORATION IN OPPOSITION

CURTIS L. ROY
2400 First National Bank Building
Minneapolis, Minnesota 55402

Of Counsel:
DORSEY, WINDHORST, HANNAFORD,
WHITNEY & HALLADAY
Minneapolis, Minnesota

1977—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	3
1. History of the Litigation	3
2. The Area and its Management	5
3. The Existing Timber Sales	7
4. The BWCA Management Plan	7
Argument:	
I. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISION OF THIS COURT IN KLEPPE V. SIERRA CLUB	9
II. THE WILDERNESS ACT ISSUE IS AN EXTREMELY NARROW ONE, APPLYING ONLY TO A SMALL AREA OF NORTHEASTERN MINNESOTA, AND HAVING NO GENERAL OR NATIONAL SIGNIFICANCE; THE COURT OF APPEALS DECIDED THAT ISSUE CORRECTLY	12
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Kleppe v. Sierra Club, — U.S. —, 49 L. Ed. 2d 576, 96 S. Ct. 2718, 44 U.S.L.W. 5104 (1976) 9, 11

Statutes:

National Environmental Policy Act, 42 U.S.C. §4321-4347, 83 Stat. 852 (1964) 3
Shipstead-Newton-Nolan Act, 16 U.S.C. §577-577b, 46 Stat. 1020 (1930) 5
Wilderness Act, 16 U.S.C. §§1131-1136, 78 Stat. 890 (1964) 3, 4, 6, 12

Regulations:

36 C.F.R. §293.16 (1976) 3, 5

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-870

MINNESOTA PUBLIC INTEREST RESEARCH GROUP,

Petitioner,

vs.

SECRETARY OF AGRICULTURE; JOHN V. McGUIRE, individually, and as Chief, United States Forest Service; JAY CRAVENS, individually, and as Regional Forester; HAROLD ANDERSON, individually, and as Supervisor, Superior National Forest; CONSOLIDATED PAPERS, INC.; THE NORTHWEST PAPER COMPANY; NORTHERN FOREST PRODUCTS, LTD.; KAINZ LOGGING COMPANY; EMIL ABRAMSON; BOISE CASCADE CORPORATION; and SIERRA CLUB,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

BRIEF FOR RESPONDENTS POTLATCH CORPORATION, NORTHERN WOOD PRESERVERS, LTD., AND BOISE CASCADE CORPORATION IN OPPOSITION

I.

OPINIONS BELOW

The opinions delivered by the Courts below in the earlier stage of the litigation are reported at:

358 F. Supp. 584, 5 ERC 1251 (D. Minn. 1973)
498 F. 2d 1314, 6 ERC 1694 (8th Cir. 1974) (en banc)

Opinion delivered by the Courts below in the current stage of litigation are reported at:

401 F. Supp. 1276 (D. Minn. 1975)
541 F. 2d 1292, 9 ERC 1220 (8th Cir. 1976) (en banc)

II.

JURISDICTION

The grounds on which the jurisdiction of this Court is invoked are adequately stated in the petition.

III.

QUESTIONS PRESENTED

1. Whether the U.S. Forest Service acted arbitrarily in adopting an overall Management Plan for the BWCA which provides for, among other things, the completion of logging operations on six separate and distinct, existing, specifically located, and partially completed timber sales, but which leaves to future determination the detailed criteria for the making of future timber sales.

2. Whether the Court of Appeals correctly interpreted the Wilderness Act of 1964 as not prohibiting the logging of virgin timber in the Portal Zone of the BWCA.

IV.

STATUTORY PROVISIONS INVOLVED

Section 4 (d) (5) of the *Wilderness Act of 1964*, 16 U.S.C. §1133 (d) (5), 78 Stat. 895 (1964)
National Environmental Policy Act, 42 U.S.C. §§4321-4347, 83 Stat. 852 (1969)
Special Regulations for the Boundary Waters Canoe Area, 36 C.F.R. §293.16 (1976)

V.

STATEMENT OF THE CASE

1. History of the Litigation

In late 1972, Petitioner brought suit under the National Environmental Policy Act (NEPA), 16 U.S.C., §§4321 *et seq.*, seeking to enjoin logging in the Boundary Waters Canoe Area (BWCA) of northeastern Minnesota. Named as defendants were officials of the U.S. Forest Service, and private companies holding contracts, generally referred to as "timber sales", for the harvesting of timber in the BWCA.

On February 2, 1973, the District Court enjoined logging pending the completion by the Forest Service of its new Management Plan for the BWCA, and accompanying environmental impact statement (EIS). The District Court held that, although all of the timber sales had been made prior to the effective date of NEPA, continued administra-

tion of these sales by the Forest Service constituted major federal action requiring an EIS. The opinion which the District Judge filed subsequently is found in the Appendix at A-14 to A-96, and is reported at 358 F. Supp. 584 (D. Minn. 1973).

The U.S. Court of Appeals for the Eighth Circuit affirmed in an *en banc* decision, three judges dissenting. That decision is found in the Appendix at A-97 to A-122, and is reported at 498 F. 2d 1314 (8th Cir. 1974).

Later in 1974, the Forest Service issued its new Management Plan for the BWCA, with accompanying EIS. Petitioner and the Sierra Club promptly renewed the litigation, contending that the Wilderness Act of 1964, 16 U.S.C. §§1131 *et seq.*, prohibited commercial logging in the virgin forest areas of the BWCA, and further that the Management Plan and EIS were procedurally and substantively inadequate under NEPA.

The District Court issued a preliminary injunction, and after a lengthy trial, issued a permanent injunction against logging in the virgin forest areas of the BWCA. The District Court held that the Wilderness Act prohibited such logging, and further that the Forest Service's EIS was inadequate under NEPA. The District Court's decision is found in the Appendix at A-123 to A-223, and is reported at 401 F. Supp. 1276 (D. Minn. 1975).

The Court of Appeals reversed in a unanimous *en banc* decision, holding that the Wilderness Act did not prohibit commercial logging in the BWCA, and that the EIS was sufficient under NEPA. That decision is found in the Appendix at A-224 to A-264, and is reported at 541 F. 2d 1292 (8th Cir. 1976).

2. The Area and its Management

The Boundary Waters Canoe Area (BWCA) is located along the Canadian border in northeastern Minnesota. The BWCA is approximately 1,030,000 acres in size, and contains approximately 501,000 acres of virgin forest as that term has been used in this litigation. The BWCA is part of the Superior National Forest, and as such is administered by the U.S. Forest Service.

As its name implies, the Boundary Waters Canoe Area is primarily a canoe recreation area. Some 94 percent of the persons coming to the BWCA visit it for water recreation purposes.[1]

The BWCA is divided into two zones under regulations issued by the Secretary of Agriculture.[2] The Interior Zone, sometimes referred to as the "no-cut" zone consists of approximately 618,000 acres, 354,000 acres of which are virgin forest. It is the heart of the BWCA; it contains over 90 percent of the lake surface of the BWCA, and is the area which receives primary recreation usage.

The other zone is the Portal Zone. As the name implies, the Portal Zone is the entry zone through which persons pass to reach the Interior Zone. The Portal Zone which is at the perimeter of the BWCA, consists of approximately 412,000 acres, of which 147,000 acres are virgin forest.[3]

Commercial harvesting of virgin timber, in the "back country" areas away from the lakes and streams[4], has

---

[1]Environmental Impact Statement (EIS), pages 16-17. The EIS is Government Exhibit 47.

[2]36 C.F.R. § 293.16 (1976).

[3]District Court opinion of August 13, 1975, Appendix at A-132, 401 F. Supp. at 1285; 1976 Court of Appeals opinion, Appendix at A-227, 541 F.2d at 1295.

[4]The Shipstead-Newton-Nolan Act of 1930, 16 U.S.C. § 577-577b, prohibits logging within 400 feet of the shoreline. By administrative direction, the Forest Service prohibits logging to the "military crest" which is the highest point which can be seen from the surface of the water.

been an historic use of the Portal Zone. In its 1976 decision, the Court of Appeals discussed the history of logging in the BWCA thus:

> Commercial harvesting of virgin timber has historically been a permissible use within the Portal Zone of the BWCA. This logging has been sanctioned by both congressional and administrative authority. During most of this century, the BWCA has been managed under a policy of multiple use forest management. (Appendix at A-256; 541 F. 2d at 1308).

The regulations of the Secretary of Agriculture establishing the two zones were made pursuant to the so-called "BWCA special provision" found in Section 4(d)(5) of the Wilderness Act of 1964, 16 U.S.C. §1133(d)(5). That Section provides in material part as follows:

> Other provisions of this chapter to the contrary notwithstanding, the management of the Boundary Waters Canoe Area, . . . shall be in accordance with regulations established by the Secretary of Agriculture in accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, *including that of timber,* the primitive character of the area, particularly in the vicinity of lakes, streams, and portages . . . (emphasis supplied)

The Court of Appeals held that this provision did not prohibit logging in the Portal Zone of the BWCA, stating:

> The administrative history of the BWCA and the legislative history of the Wilderness Act conclusively show that logging was to continue as a permissible use within the BWCA's Portal Zone under the Act. (Appendix at A-231; 541 F. 2d at 1297).

The administrative history of the BWCA and the legislative history of the Wilderness Act are detailed in an Appendix to the Court of Appeals decision. Appendix at A-256 to A-264; 541 F.2d at 1308-1311.

3. The Existing Timber Sales

At present, there are six timber sales in effect in the BWCA. All six sales were made prior to January 1, 1970, the effective date of the National Environmental Policy Act (NEPA). These timber sales are held by Boise Cascade Corporation, Potlatch Corporation[5], and North-Wood Preserves, Ltd.[6] under contracts with the U.S. Forest Service.

These are separate and distinct timber sales, each of which is confined to a specifically prescribed area. The network of logging roads is already partially in place on these sales, and logging operations have been partially completed on each. All six were active timber sales until enjoined by the District Court in 1973.

The total area remaining to be logged on these six existing timber sales is approximately 5,000 acres. Appendix A at A-227; 541 F. 2d at 1296. *Thus, these timber sales represent less than one-half of one percent of the BWCA, and only one percent of its virgin forest.*

4. The BWCA Management Plan

In 1974, the Forest Service issued its Management Plan for the BWCA, and accompanying EIS. The Man-

---

[5]Three of the timber sales were held by The Northwest Paper Company. During the course of the litigation, that company merged into Potlatch Corporation.

[6]Two of the timber sale contracts were held by Northern Forest Products, Ltd. During the course of the litigation, the name of that company was changed to Northern Wood Preservers, Ltd.

agement Plan is a land use plan which was intended to establish the overall management policy for the BWCA. As such, the Management Plan dealt with a wide range of subjects, only one of which was timber harvesting.

With respect to timber, the Management Plan continued the no-logging policy in the Interior Zone, the area which receives the bulk of the visitor usage[7], and which contains 69 percent of BWCA's virgin forests[8]. With respect to the Portal Zone, the Management Plan made the following policy determinations. (1) Logging under the *existing* timber sale contracts would continue, subject to modifications recommended by environmental analysis. (2) The making of *future* timber sales would not be barred because the timber to be harvested was "virgin".[9]

However, other policy determinations concerning *future* timber sales to be made were left to the Timber Management Plan which the Forest Service is to prepare for the Superior National Forest, of which the BWCA is a part. These deferred policy determinations include such matters as the number of timber sales to be made in the future, and the criteria for site selection for such future sales, the rate at which logging will occur, and the quantities and species of the timber to be harvested. An EIS will be prepared on that Timber Management Plan, thus assuring an opportunity for judicial scrutiny before any new timber sales are made.

---

[7]90 percent of the lake surface in the BWCA is found in the Interior Zone. Some 94 percent of the visitors use the BWCA for water recreation purposes.

[8]The BWCA contains 501,000 acres of virgin forest. Of these, 347,000 acres (69 percent) are found in the Interior Zone.

[9]There is nothing unusual about the logging of "virgin" forest in the BWCA. All logging which has ever occurred in the BWCA has been the logging of "virgin" forests. Appendix at A-231 to A-232; 541 F.2d at 1297-1298.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISION OF THIS COURT IN KLEPPE V. SIERRA CLUB

Petitioner contends that the decision of the Court of Appeals misapplies and conflicts with the decision of this Court in *Kleppe v. Sierra Club*, — U.S. —, 49 L.Ed. 2d 576, 96 S. Ct. 2718, 44 U.S.L.W. 5104 (1976). In that case, the Court recognized that a comprehensive EIS may be required where proposed federal actions will have a "cumulative or synergistic" environmental impact on the area.

Petitioner contends that logging on the existing timber sales, and logging on such timber sales as may be made in the future, are so inter-related as to produce the "cumulative or synergistic" environmental impact which this Court referred to in *Kleppe v. Sierra Club*, supra.

We strongly disagree. The six existing timber sales are separate and distinct logging operations, each with its own prescribed location.[10] The environmental effects of completing the logging on these sales are fully covered in the EIS. The Court of Appeals observed:

> The existing sales are adequately discussed in the EIS. The EIS describes the size, the amount cut, the amount to be cut, the type of timber, the geology, the climate, the soil, the water, the air, the vegetation, the

---

[10]Each timber sale has an identifying name. The six existing sales are the Shell Lake Sale, Sunnydale Sale, Jerry Creek Sale, West Tofte Sale, East Tofte Sale, and the Beartrap Sale. The Old Road Sale was not enjoined, and logging thereon has been completed. Appendix at A-227; 541 F.2d at 1295-1296, fns. 7 and 8.

> wildlife, and the scenic and aesthetic qualities with respect to the existing sales. A map of each sale is included in the EIS. Matrix 2 sets forth the physical, biological, cultural and economic impacts which continuing and discontinuing the sales would create. (Appendix at A-249 541 F. 2d at 1305).

It should be noted that the existing timber sales are not new sales. To the contrary, these sales were made during the period from 1959 to 1969.[11] Each of them has a substantial network of logging roads already in place, and in each instance logging had been partially completed before being enjoined.[12] The 5,000 acres remaining to be cut represent only a portion of the acreage originally included in these sales; the rest has already been logged.

The decision in the Management Plan to complete the logging on the existing timber sales is separate and distinct from the decision to make future timber sales. While the Forest Service has made the decision that future timber sales will not be barred because the forest is "virgin", it has reserved to future determination the decisions as to how many such sales would be made, when they would be made, and where they would be located.

This procedure will provide ample opportunity for the consideration of any environmental effect that the completion of the existing timber sales may have on future timber sales. We strongly doubt whether there would be any adverse effect. But in any event, there will be ample opportunity for the consideration of any such effects *before*

[11]See the 1974 Court of Appeals opinion; Appendix A at A-101 to A-102, fn. 8; 498 F.2d at 1317-1318, fn. 8.

[12]The extent of road construction and the amount already logged are described in the District Court's 1973 opinion. Appendix at A-47 to A-56; 358 F. Supp. at 604-609.

any new timber sales are made. No new timber sales will be made until the Timber Management Plan and accompanying EIS have been prepared. The EIS process will afford Petitioner a full opportunity to make its position known. Furthermore, there will be the opportunity for judicial scrutiny of the EIS, thereby assuring Petitioner of a judicial forum in which to present its views, *before* any new timber sales are made.

Whether the separate actions have such a "cumulative or synergistic" environmental effect that their consequences be considered together depends upon the facts of each case. In our opinion, the facts make it clear that there is no such effect in this case. As noted previously, the total acreage to be logged on all six existing timber sales is approximately 5,000 acres, *less than one-half of one percent of the BWCA, and only one percent of its virgin forest.*

The Forest Service has prepared an overall Management Plan for the BWCA, a Plan which dealt with a myriad of management issues. In doing so, the Forest Service elected *not* to burden that Plan with detailed criteria for the making of future timber sales, leaving such matters to the subsequent Timber Management Plan. Whether to proceed in this matter was within the discretion of the Forest Service. Under *Kleppe v. Sierra Club, supra,* the test is whether the Forest Service exercised that discretion arbitrarily. We are convinced that it did not do so.

The decision of the Court of Appeals does not conflict with the decision of this Court in *Kleppe v. Sierra Club, supra.*

II.

THE WILDERNESS ACT ISSUE IS AN EXTREMELY NARROW ONE, APPLYING ONLY TO A SMALL AREA OF NORTHEASTERN MINNESOTA, AND HAVING NO GENERAL OR NATIONAL SIGNIFICANCE; THE COURT OF APPEALS DECIDED THAT ISSUE CORRECTLY

This case does *not* involve any broad or general interpretation of the Wilderness Act of 1964. To the contrary, this case involves the interpretation of the so-called "BWCA Special Provision", a provision which relates only to this limited area of northeastern Minnesota. Consequently, the decision of the Court of Appeals does not have general or national implications.

Petitioner has mounted an elaborate attack on the Court of Appeals decision under the Wilderness Act. In doing so, Petitioner ignores the fact that it is only the "BWCA special provision" which is involved. That section provides:

> *Other provisions of this chapter to the contrary notwithstanding,* the management of the Boundary Waters Canoe Area, . . . shall be in accordance with regulations established by the Secretary of Agriculture in accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, *including that of timber,* the primitive character of the area, particularly in the vicinity of lakes, streams, and portages . . . (emphasis supplied). 16 U.S.C. §1133(d)(5).

The opening clause, "[o]ther provisions of this chapter to the contrary notwithstanding," clearly shows that the BWCA is to be given special treatment under the Wilderness Act.

The Court of Appeals made a painstaking analysis of the administrative history of the BWCA and of the legislative history of the Wilderness Act applicable thereto. That study is detailed in the Appendix to the Court of Appeals opinion. Appendix A at A-256 to A-264; 541 F. 2d at 1308-1311. That study shows that logging of "virgin" timber is an historic practice in the BWCA, a practice which was in active operation at the time the Wilderness Act was enacted.[13] Senator Humphrey, one of the chief sponsors of the Wilderness Act stated repeatedly that the new legislation was not intended to alter existing uses in the BWCA. Similar statements were made by the Chief of the Forest Service. We are convinced that the Court of Appeals placed the proper interpretation on the "BWCA special provision", the only part of the Wilderness Act at issue in this litigation.

In sum, the Wilderness Act issue involved in this case is a very narrow one having no general or national implication. The Court of Appeals decided that issue correctly.

---

[13]As the Court of Appeals noted, there were 20 active timber sales in operation in the virgin areas of the BWCA at the time the Wilderness Act was enacted. Appendix at A-232; 541 F. 2d at 1297-1298.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

CURTIS L. ROY
2300 First National Bank Building
Minneapolis, Minnesota 55402
Telephone: (612) 340-2784
Attorney for Respondents Potlatch Corporation, Northern Wood Preservers, Ltd., and Boise Cascade Corporation

Of Counsel:

DORSEY, WINDHORST, HANNAFORD,
WHITNEY & HALLADAY
Minneapolis, Minnesota